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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-1626

DANIEL J. MC CARTHY, Superintendent
California Men's Colony East,

Petitioner,

vs.

THEODORE MONROE HARPER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BY ATTORNEY:

ANTHONY J. MOHR
9460 Wilshire Boulevard
Suite 500
Beverly Hills, California 90212

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BRIEF OF RESPONDENT IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
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NINTH CIRCUIT

QUESTIONS PRESENTED

1. Are the alleged conflicts between the circuits and between this Court and the Ninth Circuit as described by Petitioner of such magnitude as to justify granting certiorari?

2. Assuming the existence of conflicts between courts as described by Petitioner, does this case present a proper vehicle with which to resolve those conflicts?

INTRODUCTION

In 1975, respondent Theodore Monroe Harper filed a petition for writ of habeas corpus against the superintendent of California Men's Colony East, Daniel J. McCarthy. In his petition, he attacked his plea bargain because he received ineffective representation, the plea was coerced, and the district attorney suppressed evidence that would have demonstrated Harper's innocence. Respondent alleged that he was not allowed to withdraw his guilty plea after discovering exculpatory evidence. Respondent's petition followed a series of petitions for habeas corpus in the California courts, including a petition to the California Supreme Court, which issued a "post card denial" of the petition without citing any authorities.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

I

THIS CASE DOES NOT PRESENT THE PROPER FACT SITUATION WITH WHICH TO RESOLVE THE LEGAL ISSUES WHICH PETITIONER DISCUSSES

The thrust of petitioner's argument is that in the area of habeas corpus, the administration of justice will be enhanced

if the court resolves the decisional conflicts not only between the Ninth and the Seventh Circuits, but also between the Ninth Circuit and the Supreme Court (Petition, pages 7,8). While respondent agrees that it would be beneficial for the court to address these questions, respondent contends that the within case does not present the proper vehicle with which to do so.

Petitioner's entire argument depends on the assumption that Mr. Harper presented virtually nothing more than unintelligible conclusory allegations to the California Supreme Court. Respondent disagrees vigorously with this contention.

In his report, Magistrate John R. Kronenberg admitted that 1) Harper alleged "few facts" in support of his contentions (Petition, p. 12), and 2) Harper exhausted his state remedies "as to one of four grounds urged", suppression of exculpatory evidence (Petition, page 13).

At the very least, Mr. Harper's petition was "mixed"; it did contain some facts and the facts it presented were sufficient to exhaust at least one of his grounds for relief. Thus, the Attorney General errs when he claims that the petition contains "only unintelligible conclusory allegations.

Mr. Harper's petition represents the kind of effort for which the courts make an exception to the exhaustion doctrine. In Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978), a prisoner brought three series of unsuccessful collateral attacks in the state court system. Like Harper, his petition to the United States District Court was "mixed". The Fifth Circuit held that federal courts must weigh the conflicting interests served by the writ and the exhaustion doctrine. Exceptions to the exhaustion doctrine have been developed, said the court, to cover situations where "mechanical adherence" would not further the goals of the exhaustion doctrine or would frustrate an overriding federal concern. Id., at 354.

To the same effect is Irby v. State of Missouri, 502 F.2d 1096, 1099 (8th Cir. 1974), where the court stated that if a petitioner exhausted his state remedies on one of several claims for habeas corpus, under appropriate circumstances he may still proceed in Federal Court. Respondent submits that there is a time when a court must consider the substance and ignore defects in form. In United States ex rel Di Niro vs. Mancusi, 298 F.Supp. 1294 (S.D.N.Y. 1969), the court mentioned in a footnote that a review of the state record indicated that the petitioner presented only one of two unrelated claims. While an avenue for state relief remained available, the court "... deems it expedient to decide the claims upon the merits and thus eliminate further time consuming action on the part of state and federal judges." Id., at 1295 n.2.

Based upon these reasons, respondent believes that while it might be beneficial to address the issues raised by the Attorney General, this court should wait until the California Supreme Court issues a post card denial to a habeas corpus petition which truly does consist of "unintelligible conclusory statements".

II

THE CONFLICTS BETWEEN THE SEVENTH AND NINTH CIRCUITS AND BETWEEN THIS COURT AND THE NINTH CIRCUIT AS DESCRIBED BY PETITIONER DO NOT JUSTIFY A WRIT OF CERTIORARI

Picard v. Connor (1971) 404 U.S. 270 held that "the substance of a federal habeas corpus claim must first be presented to the state courts." Id., at 278. Underlying that holding are a century of Supreme Court decisions requiring a state prisoner to exhaust his state judicial remedies before entering the federal system. Id., at 275.

///

When the Ninth Circuit came to grips with the post card denial system of the California Supreme Court in Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974), the intent was not to undercut Picard v. Connor, supra. On the contrary, the Ninth Circuit evidenced a desire to harmonize the post card denial system with the exhaustion requirement. The court sought to answer the question, how does one know when a claim has been denied on the merits? Up until Harris, there was no answer, and the resulting unpredictability must have had an inimical effect on the administration of justice. With Harris, the court answered the question.

> ". . . /W/hen the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied (citation)."
>
> Id., at 1128-1129.

These two decisions may easily be harmonized. Before an inmate files a habeas corpus claim, he first must present his claim to the state courts. If the state's highest court rejects the claim without citation of authorities, the petitioner is deemed to have exhausted his state remedies.

Nor does the Ninth Circuit's unpublished opinion in this case conflict with Harris v. Superior Court, supra. Footnote 7 of the Harris opinion cautions that the holding "assumes that there has been no deliberate bypass of state remedies, Fay v. Noia, supra, that the claim presented to the state court was the substantial equivalent of the claim presented to the federal court, Picard v. Connor, supra; Rose v. Dickson, 9 Cir. 1964, 327 F.2d 27, and that no other bar to the consideration by the federal court remains." Id., at 1129. The footnote does not make an exception where the contentions presented in the state's highest court are

inarticulate or where, as here, the habeas corpus petition is "mixed".

Respondent is hard put to see how the opinion below conflicts with the Court of Appeals for the Seventh Circuit. Neither Harris nor the unpublished opinion in this case holds that it is unnecessary to present factual allegations in order to exhaust state remedies. In fact, Harris cites In re Swain (1949) 34 C.2d 300, 209 P.2d 793 in a context suggesting that the court approves of its holding. 500 F.2d, at 1128. In Kanieski v. Gagnon, 427 F.2d 401 (7th Cir. 1970), the petitioner, after being apprised of the defective nature of his allegations, continued to rely upon his unsupported conclusions (427 F.2d, at 404). If a conflict exists between the Seventh and Ninth Circuits, its magnitude does not justify intervention by the United States Supreme Court.

CONCLUSION

Based on the reasons stated in the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

ANTHONY J. MOHR,
Attorney for Respondent

STATE OF CALIFORNIA, COUNTY OF

I, the undersigned, say (check applicable paragraph):

☐ I am a party to this action. I have read the foregoing document and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am an officer a partner_____ of _____, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on _____, 19____, at _____, California.

I declare under penalty of perjury that the above is true and correct.

_____
(Signature)

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public in and for said County and State

ACKNOWLEDGMENT OF RECEIPT

Received copy of the within document on _____, 19____.

_____
(Signature)

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of 18 and not a party to the within action; my business address is:

9460 Wilshire Boulevard, Suite 500, Beverly Hills, California 90212

On June 10, 1981, I served the within document on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Beverly Hills addressed as follows:

SEE ATTACHED LIST

Executed on June 10, 1981 at Beverly Hills, California.

(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jane B Colburn
(Signature)

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Clerk, U. S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543

United States Court of Appeals
for the Ninth Circuit
7th & Mission Streets
P.O. Box 547
San Francisco, California 94101
Court Nos. of case: CA #76-1245,
CA #76-1247

Honorable Robert Firth
United States District Judge
United States District Court
Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Donald Roeschke, Deputy
Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46, paragraph 1, of the Rules of this Court, motion is hereby made that respondent Theodore Monroe Harper be allowed to proceed in forma pauperis. An affidavit of respondent's counsel is attached to this motion.

BY ATTORNEY:

ANTHONY J. MOHR
9460 Wilshire Boulevard
Suite 500
Beverly Hills, California 90212

AFFIDAVIT OF ANTHONY J. MOHR

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ANTHONY J. MOHR, being duly sworn, deposes and says as follows:

1. I am an attorney at law licensed to practice before all of the courts of the State of California and before the Supreme Court of the United States. The facts as stated herein are personally known to me, and I have first-hand knowledge of the same. If called as a witness I would be competent to testify thereto.

2. On June 26, 1979, the United States Court of Appeals for the Ninth Circuit appointed me to represent Theodore Monroe Harper. I was appointed pursuant to the Criminal Justice Act of 1964, as amended.

3. The only compensation I have received from this case has come from the United States Treasury. Neither Mr. Harper nor anyone acting on his behalf has paid any money to me or (to my knowledge) to anyone else in connection with the within matter.

4. Based upon the foregoing, I respectfully request permission to proceed in forma pauperis on behalf of Mr. Harper.

I declare under penalty of perjury that all facts stated in the foregoing are true and correct.

ANTHONY J. MOHR

Subscribed and sworn to before me
this 10 day of JUNE, 1981.

Notary Public

OFFICIAL SEAL
BARRY A. SCHULMAN
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 28, 1981